

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:

DENNIS JOHN JORGENSEN,)
) CASE NO. 04-61775 JPK
) Chapter 7
Debtor.)

AN AFFAIR TO REMEMBER d/b/a)
Aberdeen Manor, an IN Corp.,)
Plaintiff,)
v.) ADVERSARY NO. 04-6101
DENNIS JOHN JORGENSEN,)
)
Defendant.)

DECISION ON THE APPLICATION OF COLLATERAL ESTOPPEL

This matter comes before the Court on An Affair to Remember's ("Affair") Complaint to Determine Dischargeability of Debt filed against a Chapter 7 debtor Dennis John Jorgensen ("Jorgensen") on June 23, 2004 and Jorgensen's counterclaim thereto.

In its complaint, Affair asserts that certain of Jorgensen's debts to it should be determined to be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2), (a)(4), and (a)(6) of the United States Bankruptcy Code ("Code").

The issue before the Court is the preclusive effect to be given – on the issues of exception from discharge of Jorgensen's debt to Affair – to a decision entered in a State court case prior to Jorgensen's Chapter 7 bankruptcy case with respect to the parties' dispute.

Prior to the Jorgensen's petition for relief under Chapter 7 of the Code, Affair sued Jorgensen in the Porter County Superior Court, in case number 64D01-0202-PL-1620. The state court granted Affair's motion for summary judgment, as to liability only, on Counts I and II of the complaint. Subsequently, Jorgensen filed a petition under Chapter 13 of the Code on December 12, 2003, which was converted to a case under Chapter 7 on May 18, 2004. In its Order Regarding Further Proceedings of October 18, 2004, the Court ordered the parties to submit briefs, and reply briefs, if any, which were to address the extent to which each party

contends the issues of exception from discharge addressed by Affair's complaint in this adversary proceeding are subject to principles of issue preclusion, including collateral estoppel, arising from proceedings in the State court.

The Court has jurisdiction over this adversary proceeding pursuant to 11 U.S.C. § 1334, 28 U.S.C. § 157, and N.D. Ind. L.R. 200.1. The adversary proceeding before the Court is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

I. Record Before the Court

Pursuant to the Court's order of October 18, 2004, on November 10, 2004, Affair filed its "Designation of State Court Record". This Designation provides the record for the consideration of the issue addressed by this decision.

Affair's complaint in the State court was comprised of three counts. That complaint asserted three (3) theories of recovery: 1) Count I – breach of contract; 2) Count II – check deception; and 3) Count III – common law fraud.

Jorgensen responded with an answer and counterclaim, essentially denying the material averments of Affair's complaint, and asserting a counterclaim which this Court deems to be premised on breach of contract.

Affair then filed a motion for summary judgment on the entirety of its complaint, and on Jorgensen's counterclaim. On June 5, 2003, the State court, by the Honorable Roger Bradford, entered its "Order on Motion for Summary Judgment". This order granted Affair summary judgment on Count I and on Count II, but only as to liability – the order specifically declined to enter a monetary judgment on these counts, stating that "(t)he Court declines to enter any specific amount of judgment on damages at this time as that will need to be set for further hearing." The State court denied the motion for summary judgment on Count III, and also denied Affair's motion for summary judgment on Jorgensen's counterclaim, stating that "the Counter-Claim does state a cause of action . . . which preclude[s] entry of summary judgment on

Defendants (*sic*) Counter-Claim."

II. Decision

Affair asserts that the State court's decision on its motion for summary judgment is "issue preclusive" with respect to its complaint in this adversary proceeding. Jorgensen asserts that the State Court's decision is "issue preclusive" with respect to Affair's complaint in this adversary proceeding. Both parties are incorrect.

To open, the Court first notes that based upon the factual allegations of the complaint and the record now before the Court, Affair's complaint in this adversary proceeding fails to state a claim upon which relief may be granted under either 11 U.S.C. § 523(a)(4) or 11 U.S.C. § 523(a)(6).¹ This is purely and simply an action which lives or dies under 11 U.S.C. § 523(a)(2)(A). Admittedly, Jorgensen has not raised this objection to the complaint. Affair's memorandum on the issue addressed by this decision focuses, as it must and should, on 11 U.S.C. § 523(a)(2)(A), and that **is** the only viable issue on which Affair's adversary complaint, as presently before the Court, can be premised. The Court won't waste trees by addressing the reasons the allegations of Affair's complaint don't raise issues under §§ 523(a)(4) or 523(a)(6), especially in light of the fact that Affair has targeted 11 U.S.C. § 523(a)(2)(A) in its presentation.

It is undisputed that collateral estoppel (also known as issue preclusion) applies in the bankruptcy context. *In re Jones*, 180 B.R. 531, 532 (S.D.Ind. 1994) citing *Grogan V. Garner*, 498 U.S. 279. n. 11, 111 S.Ct. 654, 658, n.11, 112 L.E.2d 755 (1991). Generally, whether or not a particular judgment is entitled to preclusive effect is determined by state law. *Wolverine Mutual Insurance v. Vance*, 325 F.3d 939 (7th Cir. 2003); *In re Scarborough*, 171 F.3d 638 (8th Cir. 1999) *cert. denied* 528 U.S. 931 (1999); *In re Keaty*, 397 F.3d 264, 270 (5th Cir. 2005) (discussing the requirement of "actually litigated"); *Brokaw v. Weaver*, 305 F.3d 660, 669 (7th Cir.2002) ["The preclusive effect of a state court judgment in a federal case is a matter of state

¹ This matter will be addressed at the status conference scheduled by this order.

rather than of federal law"].

Collateral estoppel bars the resuscitation of questions that have been previously litigated. More specifically, under federal law, collateral estoppel applies if the following factors can be satisfactorily established: (1) the issue sought to be precluded is the same as that involved in a prior action, (2) the issue was actually litigated, (3) determination of the issue was essential to the final judgment, and (4) the party to be estopped was fully represented in the prior action. [emphasis supplied by this Court]; *Levinson v. United States*, 969 F.2d 260, 264 (7th Cir.1992) (citing *Klingman v. Levinson*, 831 F.2d 1292, 1295 (7th Cir.1987); *In re Massey*, 228 B.R. 686, 690 (Bankr. S.D.Ind. 1998); *In re Busick*, 264 B.R. 518, 522 (Bankr. N.D.Ind. 2001); *In re Staggs*, 177 B.R. 92, 95 (N.D.Ind. 1995); *In re Lehman's Inc. of Andersen*, 163 B.R. 814, 816 (S.D.Ind. 1994).

Under Indiana law, the same elements for collateral estoppel apply. *In re Jones*, 180 B.R. 531, 533 n.3 (S.D.Ind. 1994); see also *Millenium Club, Inc. v. Avila*, 809 N.E.2d 906 (Ind.Ct.App. 2004) citing *Pritchett v. Heil*, 756 N.E.2d 561 (Ind.Ct.App. 2001); *Infectious Disease of Indianapolis, P.S.C. v. Toney*, 813 N.E.2d 1223, (Ind.Ct.App. 2004); *Tofany v. NBS Imaging Systems, Inc.*, 616 N.E.2d 1034 (Ind. 1993).

Interestingly enough here, both parties argue that collateral estoppel should apply. In addition, each argues that the application of collateral estoppel strengthens its/his case. The Court must disagree with both parties, however, and finds that the Porter County summary judgment decision is not entitled to any collateral estoppel effect in this adversary proceeding.

The primary problem for both parties is that the State court's decision is not a final judgment. The judgment did not finally resolve the third count of Affair's complaint, and it left open the issue of damages on both the first and second counts due to the pendency of a viable counterclaim. More to the point, Rule 54 of the Indiana Rules of Trial Procedure, in consonance with Rule 54 of the federal Rules of Civil Procedure, states that in the absence of the direction of

final judgment with respect to a determination that resolves less than all of the claims against all of the parties presented in a complaint, a "decision . . . which adjudicates fewer than all the claims . . . shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before entry of judgment adjudicating all the claims . . .". The lack of finality is underscored by Rule 52 (B) of the Indiana Rules of Trial Procedure, which provides that "at any time before a motion to correct errors (Rule 59) is required to be made . . . ", the Court may change its decision. Absent certification/direction of the entry of final judgment in the manner provided by the first sentence of Rule 54(B), a judgment is not final [*Rayle v. Bolin*, Ind. App., 769 N.E.2d 636 (2002)] and thus lacks the finality required to establish the bases for collateral estoppel in a subsequent case ; *White v. Davis*, Ind. App., 428 N.E.2d 803 (1981).

An absolutely necessary element of issue preclusion is that the court's judgment upon which preclusion is premised have been a **final** judgment. That is not the case here. Such being the case, further review of reasons why neither parties' assertions of issue preclusion can be sustained is unnecessary.

IT IS ORDERED that the Porter County Superior Court's summary judgment in case number 64D01-0202-PL-1620 is not entitled to be given preclusive effect under the doctrine of collateral estoppel.

IT IS FURTHER ORDER that a telephonic preliminary pre-trial conference will be held on **May 25, 2005, at 9:45 A.M.** to address the course of further proceedings in this case.

Dated at Hammond, Indiana on April 21, 2005.

/s/ J. Philip Klingeberger
J. Philip Klingeberger
United States Bankruptcy Court

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